Nur Ibrahim Masilamani & Anor v Joseph Lopez

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-798–07 OF 2012
YEOH WEE SIAM J
12 APRIL 2013

Civil Procedure — Case management — Striking off — Defence — Defendant repeatedly failing to comply with unless order to file statement of agreed facts and issues to be tried — Whether there were issues to be tried — Whether defendant precluded from defending plaintiff's claim — Rules of Court 2012 O 33 r 5 & O 34 r 1(3)

Civil Procedure — Unless orders — Failure to comply — Unless order to file statement of agreed facts and issues to be tried — Preliminary objection raised by plaintiff upon defendant's repeated failure to obey previous case management — Peremptory order to be complied with promptly and strictly — Whether defendant precluded from defending plaintiff's claim — Rules of Court 2012 O 33 r 2

During case management ('CM') of the case on 17 August 2012, the court gave directions and made an unless order for the trial documents, including the statement of agreed facts ('SOAF') and issues to be tried ('ITBT'), to be filed by 8 October 2012. On the first day of the full trial, the plaintiffs' counsel made an oral preliminary objection ('the PO') under O 33 r 2 of the Rules of Court 2012 ('the ROC') on the grounds that the defendant had failed to comply with the CM directions given on 17 August 2012. On 25 September 2012, the plaintiff's counsel had enclosed the SOAF and ITBT to the defendant's counsel and requested him to revert within seven days. Defendant's counsel failed to revert and after giving the defendant's counsel further written notice, the plaintiff's counsel filed the SOAF and ITBT on her own on 8 October 2012. The defendant's counsel claimed that on the morning of the trial, the court interpreter requested him to sign the court's physical copies of the plaintiffs' SOAF and ITBT, and he did.

Held, allowing the plaintiffs' PO and precluding the defendant from defending the action and granting judgment to the plaintiffs as prayed:

(1) The unless order given on 17 August 2012 for the trial documents to be filed by 8 October 2012 was a peremptory order which had to be complied with promptly and strictly by both parties. This was a New Civil Court ie an NCVC established for the purpose of expediting the trial of cases and completing them within nine months, if possible, from

the time of registration of the case. As such, it was crucial that all orders given during CM be complied with by both parties according to the timelines given by the court (see para 20).

(2) Defendant's counsel had no regard for the timeline given by the court, and did not take the court's unless order seriously. Worse still, even without informing plaintiffs' counsel first and then obtaining leave of the court, he decided to sign the SOAF and ITBT filed by plaintiffs' counsel on the morning of the trial ie the copies from the judge's physical file. Such an act was not acceptable because the timeline for filing of such documents was already over and no leave of court was obtained (see para 22).

(3) By the fact that the defendant's counsel did not sign and then e-file afresh the SOAF and ITBT (filed previously by the plaintiffs' counsel), it meant that, on record, there was no statement of agreed facts and no issues to be tried which had been agreed to by both parties. The defendant's counsel did not comply with the filing of these two documents which are required to be filed in accordance with O 34 r 2(j) and (k) of the ROC for pre-trial case management (see para 22(d)).

(4) By the defendant's failure to revert to the plaintiffs' counsel or agree to the SOAF and ITBT filed by them, it further meant that the defendant did not agree to any fact and was therefore disputing every fact, and also did not have any issue to be tried. Hence, in exercise of the court's powers under O 33 r 5 and O 34 r 1(3) of the ROC, the defendant was precluded from defending the case. Since the defendant had not deemed it fit to raise any issues to be tried, the defendant's defence was struck out (see paras 22 & 28).

[Bahasa Malaysia summary

Sewaktu pengurusan kes (PK) pada 17 Ogos 2012, mahkamah telah memberikan arahan dan membuat 'unless order' bagi dokumen-dokumen perbicaraan, termasuk penyata fakta yang dipersetujui (' SOAF') dan isu untuk dibicarakan ('ITBT'), yang akan difailkan sebelum 8 Oktober 2012. Pada hari pertama perbicaraan penuh, peguam plaintif membuat bantahan awal oral ('PO') di bawah A 33 k 2 Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan bahawa defendan gagal mematuhi arahan CM yang diberikan pada 17 Ogos 2012. Pada 25 September 2012, peguam plaintif telah melampirkan SOAF dan ITBT kepada peguam defendan dan meminta agar dikembalikan dalam tempoh tujuh hari. Peguam defendan gagal untuk mengembalikan dokumen-dokumen tersebut dan setelah memberikan peguam defendan notis bertulis lanjut, peguam plaintif pendiri telah memfailkan SOAF dan ITBT pada 8 Oktober 2012. Peguam defendan mendakwa bahawa pada pagi perbicaraan itu, jurubahasa mahkamah memintanya untuk menandatangani

salinan fizikal mahkamah SOAF dan ITBT plaintif, dan dia telah menandatanganinya. A

Diputuskan, membenarkan PO plaintif dan menghalang defendan daripada membela tindakan itu dan memberikan penghakiman kepada plaintif seperti yang telah dipohon: B

(1) 'Unless order' yang diberikan pada 17 Ogos 2012 untuk dokumen perbicaraan yang hendak difailkan sebelum 8 Oktober 2012 adalah suatu perintah muktamad yang mesti dipatuhi dengan segera dan ketat oleh kedua-dua pihak. Ini adalah mahkamah sivil baru iaitu NCVC yang ditubuhkan bagi tujuan mempercepatkan kes-kes perbicaraan dan melengkapkan kes-kes tersebut dalam tempoh sembilan bulan, jika mungkin, dari masa pendaftaran kes. Oleh itu, ia adalah penting bahawa semua perintah yang diberikan semasa CM dipatuhi oleh kedua-dua pihak mengikut garis masa yang diberikan oleh mahkamah (lihat perenggan 20). C D

(2) Peguam defendan tidak mengambil kira masa yang diberikan oleh mahkamah, dan tidak mengambil 'unless order' mahkamah dengan serius. Lebih buruk lagi, tanpa memaklumkan terlebih dahulu kepada peguam plaintif dan kemudian mendapatkan kebenaran mahkamah, dia memutuskan untuk menandatangani SOAF dan ITBT yang difailkan oleh peguam plaintif pada pagi perbicaraan iaitu salinan dari fail fizikal hakim. Perbuatan itu tidak boleh diterima kerana tempoh masa untuk memfailkan dokumen-dokumen itu sudah melebihi dan tiada kebenaran mahkamah telah diperolehi (lihat perenggan 22). E F

(3) Melalui fakta bahawa peguam defendan tidak menandatangani dan kemudian memasukkan e-file baru pada SOAF dan ITBT (sebelum itu difailkan oleh peguam plaintif), ini bermakna, pada rekod, tidak ada penyata fakta dipersetujui dan tidak ada isu dibicarakan telah dipersetujui oleh kedua-dua pihak. Peguam defendan tidak mematuhi pemfailan kedua-dua dokumen yang dikehendaki difailkan mengikut A 34 k 2 (j) dan (k) KKM untuk pengurusan kes sebelum perbicaraan (lihat perenggan 22(d)). G

(4) Disebabkan oleh kegagalan defendan untuk mengembalikan dokumen kepada peguam plaintif atau bersetuju dengan SOAF dan ITBT yang difailkan oleh mereka, ini bermakna defendan tidak bersetuju dengan apa-apa fakta dan oleh itu telah mempertikaikan setiap fakta, dan juga tidak mempunyai sebarang isu untuk dibicarakan. Oleh itu, dalam melaksanakan kuasa-kuasa mahkamah di bawah A 33 k 5 dan A 34 k 1 (3) KKM, defendan telah dihalang daripada membela kes itu. Memandangkan defendan menganggap tidak wajar untuk membangkitkan apa-apa isu yang akan dibicarakan, pembelaan defendan dibatalkan (lihat perenggan 22 & 28).] H I

Notes

For cases on failure to comply, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 9479–9481.

Cases referred to

Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar Shah & Anor (No 1) [2005] 4 MLJ 87, HC (consd)

Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd [2004] 4 MLJ 446; [2004] 3 CLJ 88, CA (consd)

Sunway PMI-Pile Construction Sdn Bhd v Pembenaan Chan & Chua Sdn Bhd [2002] 7 MLJ 538; [2003] 5 CLJ 63, HC (consd)

Legislation referred to

Rules of Court 2012 O 33 rr 2, 5, O 34 O 34 r 1(1), (2), 2(j), (k), (3)

Harwinder Kaur (AJ Ariffin, Yeo & Harpal) for the plaintiff.
Andrew Davis (Andrew Davis & co) for the defendant.

Yeoh Wee Siam J:

[1] This is an appeal against my decision made on 21 March 2013 where after hearing oral submissions from parties in respect of the oral preliminary objection ('the PO') raised by counsel for the plaintiffs, I allowed the PO and precluded the defendant from defending the action and gave judgment to the plaintiffs as prayed in the writ of summons and statement of claim (encl 1).

BACKGROUND FACTS

[2] During case management ('CM') of the case on 17 August 2012, I gave directions for the following documents to be filed on or before 8 October 2012 in preparation for full trial of the action:

(a) bundle of pleadings ('BOP');

(b) statement of agreed facts;

(c) issues to be tried;

(d) summary of case of the respective parties;

(e) one common bundle of documents ('CBOD') in parts A, B and C;

(f) list of witnesses of the respective parties.

(All of the above documents to be referred to as 'the trial documents')

[3] I further gave an unless order ie that if the above documents are not filed

by 8 October 2012, then in the case of the plaintiff, the court can exercise its discretion to dismiss the action, or in the case of the defendant, the court can make an order to preclude the defendant from defending the action and/or strike out the defence, and give judgment in favour of the plaintiff.

[4] On the next CM date on 11 October 2013, the trial documents had not been filed. Counsel for the plaintiffs informed the court that since the defendant had made an application to amend the defence and to add a counterclaim (encl 8), and if such application is allowed by the court, the trial documents would have to be revisited. Counsel for the defendant informed the court that the defendant is residing in Australia and only recently came to Kuala Lumpur to collect all served documents from his former solicitors.

[5] Enclosure 8 was heard on 8 November 2012 after which I dismissed the defendant's application with costs of RM2,000 to be paid forthwith.

[6] I then proceeded to give orders for the trial documents to be filed on or before 6 December 2012. I further ordered that the witness statements/Q & blank A statements (in the case of a subpoenaed witness) be filed on or before 28 February 2013.

[7] The full trial dates were fixed on 21 March 2013 and 22 March 2013.

[8] On the next CM date on 4 March 2013, I ordered that some of the outstanding trial documents be filed on or before the final CM date on 18 March 2013:

(a) the defendant's summary of case;

(b) the witness statements of the respective parties; and

(c) list of exhibits of the respective parties.

[9] On 18 March 2013, both counsel informed the court that they had filed their respective witness statements manually. Counsel for the defendant informed me that he had also filed the defendant's summary of case manually. I informed counsel that the witness statements of both parties, and the defendant's summary of case have to be e-filed by 19 March 2013 since the court only recognises documents which are e-filed and they form the official file of the court. I gave another unless order for such filing. Documents filed manually do not constitute proper filing of documents. I gave this unless order to ensure strict compliance by both parties.

[10] On the first day of the full trial, counsel for the plaintiff made an oral preliminary objection ('the PO') under O 33 r 2 of the Rules of Court 2012 ('the ROC').

Order 33 r 2 of the ROC provides:

> Time of trial of questions or issues (O 33 r 2)
>
> 2 The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[11] She submitted that under O 33 r 5 of the ROC, the court can dismiss an action after allowing a PO.

Order 33 r 5 of the ROC provides:

> Dismissal of action after decision of preliminary issue (O 33 r 5)
>
> 5 If it appears to the court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[12] Counsel for the plaintiffs submitted on the issue for the PO that the defendant failed to comply with the CM directions of the court given on 17 August 2012. She stated that the court had given an unless order on that date for the trial documents to be filed, including the statement of agreed facts ('SOAF') and issues to be tried ('ITBT') by 8 October 2012.

[13] On 25 September 2012 her office enclosed the SOAF and ITBT to counsel for the defendant and requested him, to revert to them within seven days (exh C of encl 17 at p 15).

[14] Counsel for the defendant failed to revert to them and she therefore gave him notice by a letter dated 4 October 2012 that if he fails to revert to them by 5 October 2012, they shall proceed to file the SOAF and ITBT by 8 October 2012 and gave notice that without reference to them, they would apply for judgment because of the unless order given.

[15] Counsel for the defendant failed to revert to them. Counsel for the plaintiffs then filed the SOAF and ITBT on her own on 8 October 2012 (pp 18 and 19 of encl 47) in compliance with the court order.

[16] On 18 March 2013 both counsel appeared again before the court. The court again pronounced another unless order.

[17] Counsel for the plaintiffs submitted that the court's unless order is justified. The plaintiffs have filed their own version of the SOAF and ITBT and until the date of trial, counsel for the defendant did not revert to them on those documents.

[18] Counsel for the defendant submitted that on the morning of the trial, the court interpreter requested him to sign the court's physical copies of the plaintiffs' SOAF and ITBT, and he did.

[19] After considering the submissions of both counsel, I allowed the plaintiffs' PO and precluded the defendant from defending the action. I further granted judgment to the plaintiffs as prayed.

[20] I am of the view that the unless order given on 17 August 2012 for the trial documents to be filed by 8 October 2012 is a peremptory order which must be complied with promptly and strictly by both parties. It must be borne in mind that this is a new civil court ie an NCVC established for the purpose of expediting the trial of cases and completing them within nine months, if possible, from the time of registration of the case. As such, it is crucial that all orders given during CM be complied with by both parties according to the timelines given by the court.

[21] In this case, counsel for the defendant was requested by counsel for the plaintiffs to revert to them within seven days from their letter in order that they can comply with the timeline of 8 October 2012 given by the court for the filing of the SOAF and the ITBT. Counsel for the defendant failed to do so. He was then given notice by counsel for the plaintiffs that they would proceed to obtain judgment against the defendant. According to counsel for the plaintiffs, despite this notice, and which notice was again given by her even on the date of the last CM on 18 March 2013, and despite oral persuasion by her on 18 March 2013, counsel for the defendant refused to agree to the SOAF and ITBT filed by her.

[22] I find that counsel for the defendant has no regard for the timeline given by the court, and did not take the court's unless order seriously. Worse still, even without informing counsel for the plaintiffs first and then obtaining leave of the court, he decided to sign the SOAF and ITBT filed by counsel for the plaintiffs on the morning of the trial ie the copies from the judge's physical file. I do not find such an act is acceptable for the following reasons:

(a) the timeline for filing of such documents is already over ie long past the 8 October 2012. Even assuming that some indulgence is given to him to file the documents beyond that date on the other timelines given by the court subsequently eg 6 December 2012, 18 March 2013 and 19 March 2013 for the other trial documents to be filed, counsel for the defendant did nothing.

(b) No leave of court was obtained.

The court interpreter was under the wrong impression that the SOAF and ITBT had been duly filed but counsel for the defendant had forgotten to sign the documents at the blank space for his signature therein.

Counsel for the defendant cannot rely on the excuse that the court interpreter requested him, on the morning of the trial, to sign the physical copies of the SOAF and ITBT because he has to inform counsel for the plaintiff first and then apply for the leave of the court to do so.

(c) The signing by counsel for the defendant on the physical copies of the SOAF and ITBT in the judge's personal physical file of the cause papers does not constitute official e-filing of the documents and ought to be rejected. The judge's personal physical file is only for the judge's own quick reference and reading and it is usually used as a back-up file should the e-system ie the electronic case management system ('CMS') of the court be suddenly slow or breaks down. From the last CM on 18 March 2013, counsel for the defendant should already know, in case he pleads ignorance, that the trial documents must be e-filed and the court rejects documents filed manually, including documents signed on physical copies, but not e-filed through the CMS.

(d) By the fact that counsel for the defendant did not sign and then e-file afresh the SOAF and ITBT (filed previously by counsel for the plaintiffs), it means that, on record, there is no statement of agreed facts and no issues to be tried *which have been agreed to by both parties*. Counsel for the defendant did not comply with the filing of these two documents which are required to be filed in accordance with O 34 r 2(j) and (k) of the ROC for pre-trial case management. Counsel for the defendant did not give heed to the court's order or render cooperation to counsel for the plaintiffs and also to the court to ensure that, for the purpose of a just, expeditious and economical trial as intended by O 34 of the ROC on pre-trial case management, at least there must be some agreed facts so that

not all the facts need to be disputed, and for the agreed issues for trial to be identified in order to set parameters for the trial. Otherwise, parties might go off tangent from the core issues and unnecessarily lengthen the trial and waste precious judicial time.

Thus, by the defendant's failure to revert to counsel for the plaintiffs or agree to the SOAF and ITBT filed by them, it further means that the defendant does not agree to any fact and is therefore disputing every fact, and also *does not have any issue to be tried*.

[23] I considered the following authorities:

[24] *Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd* [2004] 4 MLJ 446 at p 451; [2004] 3 CLJ 88 at p 89 where Nik Hashim JCA, inter alia, held (allowing the defendant's appeal):

> [1] Although a party's action or counterclaim may be struck out for non-compliance with a peremptory order of the court, such an order (striking out) will not be made unless there has been a history of failures to comply with other orders of court. A peremptory order (unless order) is an order of the last resort. Such an order will not meet the 'ends of justice' if it results in a miscarriage of justice. The judge must look into all the circumstances of the case, including whether the default was intentional and contumelious, before proceeding to penalise the party in default, (p 94 c-d)

[25] *Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar Shah & Anor (No 1)* [2005] 4 MLJ 87 where Hishamudin Yunus J (as he then was) held, allowing the plaintiff's application:

> (1) The defendant's counsel, without lawful excuse, was absent at the case management hearing on 20 January 2005 and had shown a lackadaisical attitude in the proceedings (see para 18).
>
> (2) The defendants had also failed to comply with the direction of this court to serve further and better particulars on the plaintiff and had not been cooperative with their own counsel. Even the defendants' counsel had difficulty in contacting the defendants (see para 19).
>
> (3) Taking into account these factors, it would meet the ends of justice if the defence was struck out and judgment given for the plaintiff with costs (see para 22).

[26] *Sunway PMI-Pile Construction Sdn Bhd v Pembenaan Chan & Chua Sdn Bhd* [2002] 7 MLJ 538; [2003] 5 CLJ 63 where T Selventhiranathan J (as he then was) held:

> [1] Order 34 of the RHC allows the court to take a proactive role in setting down timeframes and giving directions as to the preparation of each party's

case for the purpose of the trial, while at the same time enabling the court to impose sanctions for non-compliance with the directions, (p 71 c-d)

[2] The many letters of the plaintiff's solicitors, which went unanswered, cumulatively pointed to a totally nonchalant attitude on the part of the solicitors for the defendant in their approach to the orders and directions given by the court at the pre-trial conferences. The fault for non-compliance clearly lay with the solicitors for the defendant, whose utterly recalcitrant conduct had hindered the plaintiff from proceeding with the action. In the circumstances, this was a proper case for the court to exercise its powers under O 34 r 7 of the RHC and order that the defence and counterclaim be dismissed and that judgment be entered for the plaintiff as per the statement of claim, (p 76 e-h).

[27] Order 34 r 1(1), (2) and (3) of the ROC provide:

Order 34 Pre-trial Case Management

Orders and directions for just, expeditious and economical disposal of proceedings (O 34, r 1)

1 (1) Notwithstanding anything in these Rules, the Court may, at any time after the commencement of proceedings, of its own motion, direct any party or parties to the proceedings to appear before the Court, in order that the Court may make such order or give such direction as it thinks fit so that

(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and

(b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof.

(2) Where the Court makes orders or gives directions under paragraph (1), the Court may take into account whether or not a party has complied with any relevant pre-action protocol or practice direction for the time being issued.

(3) Where any party fails to comply with any order made or direction given by the Court under paragraph (1), the Court may dismiss the action, strike out the defence or counterclaim or make such other order as it thinks fit.

[28] Based on the above considerations, and in exercise of the court's powers under O 33 r 5 and O 34 r 1(3) of the ROC, I precluded the defendant from defending the case. Since the defendant has not deemed it fit to raise any issues

to be tried, I further struck out the defendant's defence. Accordingly, I gave judgment to the plaintiffs as prayed in encl 1.

Plaintiffs' PO allowed and defendant precluded from defending the action and judgment granted to plaintiffs as prayed.

Reported by Kanesh Sundrum